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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74 - 5822

CHARLES HAMPTON,

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Counsel for Petitioner

January 8, 1975

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The Petitioner, Charles Hampton, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on December 11, 1974.

OPINIONS BELOW

The opinion of the Eighth Circuit not yet reported, appears in the Appendix, hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on December 11, 1974. This petition for Certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

1. Whether the Due Process Clause of the Fifth Amendment forbids the conviction of a defendant for selling contraband, if the contraband sold by the defendant was supplied by the Government.

STATEMENT OF THE CASE

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on two counts charging him with distributing heroin in violation of 21 U.S.C. §841 (a) (1). He was sentenced to five years imprisonment and a three-year special parole term on each of the two counts. The imposition of sentence was suspended and the defendant was placed on probation for five years; said probation conditioned upon defendant's remaining in the custody of the North Carolina prison system during the period of his probation. The Court of Appeals affirmed the conviction in all respects.

At the trial, the Government introduced the tesitmony of five witnesses in the case in chief and three witnesses in rebuttal. The defendant introduced the testimony of four witnesses, and he also testified. By agreement of the parties, the testimony of the defendant's other witnesses was not before the Court of Appeals for consideration.

A number of the important facts of this case are in dispute. The following view of the facts may, however, be drawn from the testimony of all the witnesses, but particularly that of the petitioner (hereinafter referred to as the defendant).

The defendant testified that soon after he moved to St. Louis with his common-law wife and four-year-old son, he began to frequent a lounge in his neighborhood called the Pub Bar and Grille. At the Pub, a man who introduced himself as "James Gray" struck up an acquaintance with him. (Tr. 48). Soon he and "Gray" became close friends, based on their mutual

acquaintances in Chicago and their skill at playing pool. (Tr. 48, 118). Hampton was later to learn that "James Gray" was, in reality, Jule Hutton, a Special Employee of the Drug Enforcement Administration of the United States Government. (Tr. 53). Hutton had been involved "as a special agent or special employee of the government" in "more" than "80 or 90 narcotics transactions." (Tr. 54).

Hutton, aware that the defendant and his family were in serious financial straits, proposed a plan whereby they could both make some "clean" money. (Tr. 119, 147). Under this plan, defendant testified, Hutton would obtain a quantity of counterfeit narcotics for sale to some gullible acquaintance of Hutton's in town from Colorado. (Tr. 121). This substance would be obtained, Hutton told Hampton, from a friend of Hutton's who worked in a pharmacy (Tr. 121), and the substance thus obtained would simulate heroin in every apparent respect (Tr. 121, 122, 124, 128, 137, 138).

Defendant testified at trial that Hutton did subsequently deliver such a substance to him on or about February 25, 1974. At that time, defendant testified, Hutton handed him a foil-wrapped package containing the substance that Hampton, soon after, sold to Special Agent Terry C. Sawyer. (Tr. 130-131). During that transaction on February 25, 1974, Special Agents Sawyer and McDowell initiated the making of arrangements for another such transaction, to be consumated the following night, February 26, 1974. (Tr. 132).

Defendant further testified that again, on or about February 26, 1974, Jule Hutton delivered to him a quantity of a substance that he sold later that evening to Special Agent Sawyer. (Tr. 139). At that time, defendant testified, Hutton delivered two small tinfoil packets to him at Hutton's apartment. (Tr. 139). Both Hutton and Hampton participated in the preparation of one large package of the substance from the two small tinfoil packets.

(Tr. 140). Hampton sifted the mixture through a nylon stocking, and Hutton wrapped the substance in tinfoil. (Tr. 140).

Hutton, on direct examination, testified that he again accompanied the defendant to the agents' car, (Tr. 43), and that he got into the rear seat, and the defendant into the front. (Tr. 43). After Hampton passed the tinfoil packet of the substance to Special Agent Sawyer, Sawyer got out of the automobile, and Special Agent McDowell announced that he and Sawyer were narcotics agents and that both Hutton and the defendant were under arrest. (Tr. 44).

In chambers after closing arguments, the defense moved for a special jury instruction on the defense of entrapment which reads in relevant part:

> The defendant asserts that he was a victim of entrapment as to the crimes charged in the indictment.
>
> If you find that the defendant's sales of narcotics were sales of narcotics supplied to him by an informer in the employ of or acting on behalf of the government, then you must acquit the defendant because the law as a matter of policy forbids his conviction in such a case.
>
> Furthermore, under this particular defense, you need not consider the predisposition of the defendant to commit the offenses charged, because if the governmental involvement through its informer reached the point that I have just defined in your own minds, then the predisposition of the defendant would not matter.

Petitioner's motion for the above requested instruction was denied, and the Court gave no jury instruction whatsoever on entrapment.

The Court of Appeals upheld petitioner's conviction for distribution of heroin despite his assertion that he could not be convicted as a matter of law, regardless of his predisposition to commit the offenses, when the heroin he sold was provided him by a paid government informer. Petitioner further asserted before the Court of Appeals that since there was a factual dispute as to his source of supply of the heroin, his requested instruction should have been given to the jury to let them decide that factual issue.

The Court of Appeals stated clearly that its reason for rejecting petitioner's argument was that it believed this Court's opinion in U.S. v. Russell, 411 U.S. 423 (1973)foredosed it from considering any theory of entrapment founded on other than defendant's lack of predisposition, and since it was conceded by petitioner's counsel that he was predisposed to commit the offenses, he was entitled to no other entrapment instruction. (App., infra., at pp. 5,7).

REASONS FOR GRANTING THE WRIT

The issue in this case is of fundamental importance for determining the constitutional methods that law enforcement officials can properly use to detect victimless crimes. This Court specifically recognized in Russell, infra, that some conduct of law enforcement officials may be so "outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction," but held that on the facts before it, the government's conduct did not reach this point. (411. U.S. 431-432).

In Russell, this Court held that where an undercover narcotics agent who was investigating the defendant for illicitly manufacturing a drug, offered him an essential ingredient which, although difficult to obtain, was legal to possess and was obtainable, this did not constitute entrapment as a matter of law. Thus this Court in Russell left open the question of what types of law enforcement conduct might be sufficiently outrageous to bar prosecution for a case by case adjudication.

However, both prior and subsequent to the decision in Russell, there has been a growing body of authority that universally condemned one particular law enforcement practice - that of supplying the very contraband to the defendant that was the subject of the offense with which he was charged. U.S. v. Bueno, 447 F. 2d 903 (5th Cir. 1971); U.S. v. Dillett, 254 F. Supp.

980 (S.D.N.Y. 1966); Greene v. U.S. 454 F.2d 783 (9th Cir. 1971); U. S. v. Oquendo, 490 F. 2d. 161 (5th Cir. 1974); State v. Bocelli, 105 Ariz. 405, 467 P.2d 740 (1970); State v. Powell, 181 S.E. 2d 754 (N.C. App. 1971). Moreover, both Russell and the government suggested in their briefs before the Court in that case that a conviction may be precluded on due process grounds when the government was the sole source of an otherwise unobtainable and necessary means to the commission of an offense. (411 U.S. at 431, n. 8). Indeed, it is difficult to fathom a law enforcement practice that involves the government in the commission of a crime on a greater magnitude than supplying the sine qua non of the offense. Hence, as a practical matter, if this particular law enforcement practice is not forbidden, the dissent's foreboding in the instant case seems particularly apt:

> ...In the future, it is difficult to see how any defendant in this circuit can possible raise the due process defense which the Russell Court sought to leave open... (App., infra, P.10).

Thus, the important question raised by this case is whether the Court of Appeals is properly reading the Russell decision. The Eighth Circuit's holding in this case is in direct conflict with a post-Russell Fifth Circuit holding that Russell did not overrule that Court's prior decisions that entrapment is established as a matter of law to a charge of possessing or distributing contraband where such contraband was supplied to the defendant by a government agent or paid informer. See U.S. v. Oquendo, 490 F.2d 161 (5th Cir. 1974).

The effect of the holding of the Court of Appeals in the instant case is that anything is permissible in law enforcement as long as the defendant was willing or predisposed to commit the offense. This holding clearly goes beyond anything this Court intended in Russell, is not consistent with the rationale behind Russell, is in direct conflict with the Fifth Circuit's holding in Oquendo, and for these reasons should be reviewed by this Court.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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January 8, 1975